parties must suffer, if one is faultless and the other guilty of some lack of care which presented the opportunity for the commission of the damaging act, the loss should fall upon the latter.[3] This reasoning applies with equal force to careless drawers of checks. The courts in the minority jurisdictions have objected that a drawer or maker, merely because he is careless, should not be forced into a contract other than he has made,[4] and that, since he owes no duty, he cannot be legally negligent.[5] But these arguments can still less be successfully urged on behalf of careless drawers of checks. In the first place a check is an order to pay, and not a contract, thus resembling a bill of exchange before acceptance. A check may become a contract by certification, but that is not the usual course. Whatever force, therefore, the first objection may have in the case of accepted bills of exchange and of promissory notes, which are contracts, it has no application to uncertified checks. In the second place the depositor does owe a duty to the bank. The contractual obligation of the bank to honor all of its customer's orders to pay, up to the amount of his deposit, certainly carries with it the correlative obligation of the customer not to put obstacles in the way of the bank's performance by his carelessness in drawing these orders. Further, contrary to what has occasionally been suggested, the defrauding of the bank is the proximate result of the depositor's negligence. Undoubtedly the chain of causation is generally broken by the intervention of the criminal act of a third party; but here the act is one that a reasonable man should have anticipated, as is evidenced by the precautions generally taken in drawing checks. In every case the liability of the drawer should depend upon whether or not, as a matter of fact in the particular circumstances, he employed reasonable care.[6] Thereby responsibility is expediently attached to the only person whose care can eliminate the successful commission of this fraud.

In England, in the first case on the subject, the court held the negligent drawer of a check responsible.[7] In the next important case the acceptor of a negligently drawn bill of exchange, raised after acceptance, was held not liable on the bill to a *bona fide* holder for value,[8] and the court, noticing that the earlier case dealt with a check, did not even profess to overrule it. The early decision has been followed by other cases involving checks, and though doubted somewhat in dicta in distinguishable cases, it has stood until the Judicial Committee of the Privy Council recently decided that the careless drawer of a check was to be protected in preference to the bank. *Colonial Bank of Australasia* v. *Marshall*, 22 T. L. R. 746. In so holding, the case is opposed to previously existing English authority, and, it seems, to the better legal view.

RIGHTS OF DEPOSITOR UPON SUB-DEPOSIT MADE BY DEPOSITARY BANK. — The claim of a bank against a second bank in which it has made a deposit of money is ordinarily an asset attainable by any creditor of the first bank; but in at least two instances it is believed that, upon an applica-

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[3] See Capital Bank *v.* Armstrong, 62 Mo. 59, 67.
[4] See Worrall *v.* Gheen, 39 Pa. St. 388.
[5] See Fordyce *v.* Kosminsky, 49 Ark. 40, 45.
[6] Leas *v.* Walls, 101 Pa. St. 57.
[7] Young *v.* Grote, 4 Bing. 253.
[8] Scholfield *v.* Earl of Londesborough, [1896] A. C. 514. See 8 HARV. L. REV. 418.

tion of the general rules of the law of trusts, the facts will be found to show that the first bank holds its claim against the second in trust for a particular depositor of the first bank. The first case arises where a sum of money is deposited in a bank to be forwarded to a correspondent bank, in order that the latter may meet at maturity an obligation of the depositor payable in the locality of the correspondent bank. Here the depositary bank, after forwarding the money, has against its correspondent bank, until the latter has met the obligation, a claim or credit running to it which, it is submitted, the first bank holds in trust for its client; for the first bank has no beneficial interest in the claim, but has created it solely for the sake of the depositor. Accordingly, the failure of the depositary bank at this stage of the transaction would find the depositor a secured creditor to the extent of this claim of which the bank had become trustee for him.[1] This result is but just, as a contrary rule would leave the depositor exposed to the double hazard of loss by the failure of either the depositary or the correspondent bank.

The second instance arises where the depositary bank makes a deposit with a second bank out of the funds received from a particular depositor, upon the understanding that the first bank is to draw upon the second only when the original depositor draws upon the first bank, and only for the second bank's proportionate share of such drafts. Here, by its agreement, the first bank has no right to use its claim against the second bank as general assets to meet any debt, but is confined to an application of the claim for the benefit of the original depositor. It will be noted that this case, though it arises in a different manner from the first, is similar to the first case in all respects except that here the sub-deposit is made, not, as above, at the request of the original depositor, but upon the motion of the depositary bank without any request by its client, and even, it may be, without his knowledge. But as notice to the *cestui* of the declaration of a trust is not necessary to its validity,[2] this difference is immaterial. In neither case is any element of a complete trust lacking. The legal title is in the bank, the beneficial interest in the depositor. That the parties did not call the transaction a trust is not fatal, for no form of words is necessary to the creation of a trust.[3] It is true that in both cases the depositary bank would doubtless have the right, as against the depositor, to revoke the transaction with the second bank; but this is not inconsistent with the existence of a trust. Although, if the power of revocation is not reserved expressly or impliedly, a trust is irrevocable, yet there is no doubt that a trust may be revocable by its terms.[4] Accordingly, it has been held that in the second case, also, upon the failure of the first bank the depositor is entitled as *cestui* to receive in full the proceeds of the first bank's claim against the second, in preference to the general creditors.[5]

A recent federal decision presents the same facts as in the second case, and attains the same results, but bases its conclusion upon the existence of an illegal agreement between the two banks to refrain from real competition in bidding for the original deposit and to divide it up secretly. *In re Salmon*, 145 Fed. Rep. 649 (Dist. Ct., W. D. Mo.). The reasoning of this decision, based, as it is, upon the right of the depositor to follow property

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[1] Farley *v.* Turner, 26 L. J. Ch. 710; St. Louis *v.* Johnson, 5 Dill. (U. S.) 241.
[2] Martin *v.* Funk, 75 N. Y. 134.
[3] Ames, Cas. on Trusts, 2 ed., 97 n. 2.
[4] Perry, Trusts, 5 ed., § 104.
[5] Marquette *v.* Wilkinson, 119 Mich. 413.

obtained from him illegally, is not inconsistent, however, with that already set forth, for each theory presents a distinct and adequate basis for recovery. But the suggested theory of express trust is not restricted in its scope to cases of illegality.

WHAT CONSTITUTES SUFFICIENT CONNECTION WITH THE FAMILY TO RENDER ADMISSIBLE THE DECLARATIONS OF A DECEASED PERSON CONCERNING PEDIGREE. — The weight of authority now has clearly established that declarations as to pedigree are not admissible unless made by a deceased member of the family.[1] And unless the declarant is speaking of facts in his own life which bear on pedigree,[2] he must be connected with the family in advance by evidence independent of his own statements.[3] The cases, however, are in some confusion in determining what foundation must be laid to render admissible the declarations of a member of one family that another member thereof is related to a different family. Several cases appear to decide, either directly or indirectly, that the declarant must be connected with both families.[4] A somewhat obscure sentence in Greenleaf is sometimes cited to the same effect;[5] but the authority of this is greatly weakened by a sentence directly *contra* on the same page.[5] On the other hand, there are cases which hold that it is sufficient to show declarant's connection with one family;[6] and Wigmore strongly supports this view.[7] A late case now raises the question again, and, after considering both lines of authority, squarely decides that to connect the declarant either by blood or by marriage with the person who has died seised is unnecessary, if the declarant be shown to be related to the alleged heir. *Overby* v. *Johnston*, 94 S. W. Rep. 131 (Tex. Civ. App.).

The question at hand really goes to the basis of the "pedigree" exception to the hearsay exception. Hearsay, though relevant, is excluded on the theory that its persuasive effect on the jury is likely to exceed its probative effect on the case.[8] It is difficult to show when such evidence is incorrect or self-serving. But in the case of pedigree, hearsay is admitted because of the difficulty of obtaining better evidence; yet, as a check to incorrectness, most courts yield to necessity only to the extent of admitting the declarations of relatives.[1] But for the sake of correctness there seems no need that the declarant should be shown to be connected with both families. A statement by a Smith that the Roe family is connected with the Smith family not only touches the Roe pedigree, to which the Smiths are *prima facie* strangers, but it equally touches the Smith pedigree, on which the Smiths are entitled to speak. As a check on self-serving declarations, the courts now admit only those made *ante litem motam*.[8] But though this restriction effectively excludes evidence manufactured for

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[1] Johnson *v.* Lawson, 2 Bing. 86; Waldron *v.* Tuttle, 4 N. H. 371. *Contra*, Alston *v.* Alston, 114 Ia. 29.

[2] Allen *v.* Hall, 2 Nott & McC. (S. C.) 114.

[3] Young *v.* Schulenberg, 165 N. Y. 385; Falkerson *v.* Holmes, 117 U. S. 389.

[4] Hitchins *v.* Eardley, L. R. 2 P. & D. 248. See Blackburn *v.* Crawfords, 3 Wall. (U. S.) 175; Doe d. Dunlop *v.* Servos, 5 U. C. Q. B. 284.

[5] Greenleaf, Ev., 16 ed., 198.

[6] Vowles *v.* Young, 13 Ves. Jr. 140; Monkton *v.* Atty.-General, 2 Russ. & M. 147; Sitler *v.* Gehr, 105 Pa. St. 577; Gehr *v.* Fisher, 143 Pa. St. 311.

[7] 2 Wigmore, Ev., § 1491.

[8] Berkeley Peerage Case, 4 Camp. 401.